Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

BRAD R. JOHNSON,

Plaintiff

v.

FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

BILL LOCKYER,

DENNIS L. STOUT,

COUNTY OF SAN BERNARDINO,
STATE OF CALIFORNIA,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED FOR REVIEW

Questions Presented for Review are categorized based upon the court from which each of such question arose, as follows.

United States Court of Appeals for the Seventh Circuit

1. WHETHER the Circuit Court had **jurisdiction** to review the ***District Court's October 30th Order*** transferring the entire case to the Central District of California under **28 U.S.C. Section 1406(a)** for improper venue, because such order had the practical effect of denying Plaintiff's prayer for temporary and injunctive relief and therefore was immediately appealable under **28 U.S.C. Section 1292(a)(1)** and ***Carson v. American Brands, Inc.***, 450 U.S. 79, 83-84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)?
2. WHETHER the Circuit Court had **jurisdiction** to review the ***District Court's October 30th Order*** transferring the entire case to the Central District of California under **28 U.S.C. Section 1406(a)** for improper venue, because under the collateral order doctrine of ***Cohen v Beneficial Industrial Loan Corp.***, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), such order is treated as final under **28 U.S.C. Section 1291**, since such order (i) deals with a serious and unsettled question and (ii) has the required characteristics of being separable, final and unreviewable?

QUESTIONS PRESENTED FOR REVIEW CONTINUED

3. WHETHER the Circuit Court erred in not holding that the substantive differences in legal effect between (i) a transfer for improper venue under **28 U.S.C. Section 1406(a) and** (ii) a transfer for convenience under **28 U.S.C. Section 1404(a)** cause the order transferring the case for improper venue under **28 U.S.C. Section 1406(a)** to be reviewable as a final order by the Court of Appeals for the transferor court under **28 U.S.C. Section 1291**?
4. WHETHER it was clear legal error in violation of **Rule 41(b)** of the **Federal Rules of Appellate Procedure** and **Circuit Rule 41** to preclude Plaintiff from filing his **Petition for a Writ of Mandamus** by having the Clerk of the United States Court of Appeals for the Seventh Circuit follow such Circuit Court's practice to issue mandate one day after an Order denying a Petition for Rehearing is entered?

United States District Court for the Central District of Illinois, Danville/Urbana Division

District Court's October 30th Order

5. WHETHER it was clear legal error under **Fed.R.Civ.P. 15(a)** and the **Due Process Clause** of the **Fifth Amendment** of the **U.S. Constitution** for the District Court to deny Plaintiff (a *pro se* party who objected to a *sua sponte transfer* of his case to another federal district) an opportunity to be heard on Plaintiff's First Amended Complaint with respect to the issue of improper venue and the resultant transfer pursuant to **28 U.S.C. Section 1406(a)**, where venue is controlled by **28 U.S.C. Section 1391(b)(2)**, after the District Court reversed its position and determined that Plaintiff's *Motion to File Amended Complaint* should have been granted?

QUESTIONS PRESENTED FOR REVIEW CONTINUED

6. WHETHER it was clear legal error under **28 U.S.C. Section 1391(b)(2)** [within the context of a *sua sponte transfer* under **28 U.S.C. Section 1406(a)**] for the District Court to find that venue was improper (i.e., that the District Court was not a judicial district within which a substantial part of the events or omissions giving rise to the claim occurred)?

7. WHETHER it was clear legal error under **28 U.S.C. Section 1391(b)(2)** [within the context of a *sua sponte transfer* under **28 U.S.C. Section 1406(a)**] for the District Court to find that venue was improper (i.e., that the District Court was not a judicial district within which a substantial part of property, the subject of the action, is situated)?

STATEMENT OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

There is no parent or subsidiary company to be listed, as there exists no party who is a corporation.

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OPINIONS BELOW

United States Court of Appeals for the Seventh Circuit

1. The Order of the United States Court of Appeals for the Seventh Circuit entered on February 4, 2002 dismissing the appeal for lack of jurisdiction, of whose judgment is here sought to be reviewed, is unreported and is printed in Appendix A, page A-2.
2. The Order of the United States Court of Appeals for the Seventh Circuit entered April 2, 2002 denying Plaintiff-Appellant's *Petition for Rehearing* is unreported and is printed in Appendix A, page A-4.
3. The Order of the United States Court of Appeals for the Seventh Circuit entered April 24, 2002 denying Plaintiff-Appellant's *Motion to Recall the Mandate and to Stay the Proceedings to Allow Time for Plaintiff to file his Petition for Writ of Mandamus* is unreported and is printed in Appendix A, page A-8.

United States District Court for the Central District of Illinois, Danville/Urbana Division

4. The Report and Recommendation of United States Magistrate Judge, David G. Bernthal filed August 28, 2001 is unreported and is not printed in Appendix A.
5. The District Court's September 19th Order is unreported and is not printed in Appendix A.
6. The District Court's October 30th Order is unreported and is not printed in Appendix A.

STATEMENT OF JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit (Appendix A, page A-2) was entered on February 4, 2002. A timely petition for rehearing was denied on April 2, 2002 (Appendix A, page A-4). The jurisdiction of the Court is invoked under U.S. Const. Art. III 2, cl. 1 and 28 U.S.C. Section 1254(1) where:

- the Supreme Court has the power to review a Court of Appeals decision to dismiss for lack of jurisdiction [Nixon v Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982), later proceeding 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396];
- the fact that the mandate of a United States Court of Appeals for the Seventh Circuit has been issued does not remove a case from that court for purposes of 28 U.S.C. Section 1254(1) [The Conqueror, 166 U.S. 110, 17 S. Ct. 510, 41 L. Ed. 937, (1897); Aetna Casualty & Surety Co. v Flowers, 330 U.S. 464, 67 S. Ct. 798, 91 L. Ed. 1024 (1947)]; and
- the fact that a stay has not been granted by the United States Court of Appeals for the Seventh Circuit does not affect the Supreme Court's jurisdiction to review such Court of Appeals' decision [McGraw-Hill Cos. v Proctor & Gamble Co., 116 S. Ct. 6, 132 L. Ed. 2d 892, (1995)].

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTIONAL PROVISIONS,

U.S. Const. Art. III Section 2, cl. 1: Subjects of jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Amend. V: Due process of law

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV Sec. 5: Power to enforce amendment

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTES

18 U.S.C. Section 1341: Frauds and swindles
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. Section 1343: Fraud by wire, radio, or television
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If

the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

28 U.S.C. Section 1254(1): Courts of appeals; certiorari
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. Section 1291: Final decisions of district courts
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

28 U.S.C. Section 1292(a)(1) Interlocutory decisions
(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 U.S.C. Section 1294(1) Circuits decisions reviewable
Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

28 U.S.C. Section 1343(a)(3): Civil rights and elective franchise
(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. Section 1391(a)&(b): Venue generally
(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim

occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. Section 1404(a): Change of venue
(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. Section 1406(a): Cure or waiver of defects
(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. Section 2201: Creation of remedy
(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 USCS § 7428], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 USCS § 1516a(f)(10)]), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 355 or 360b].

28 U.S.C. Section 2202: Further relief
Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. Section 1983: Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RULES

Fed.R.Civ.P. 15(a): Amended and Supplemental Pleadings
(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party;

and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Fed.R.Civ.P. 72(b): Magistrate Judges; Pretrial Orders
(b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

Fed.R.App.P. 41(b)
(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Circuit Rule 41: Immediate Issuance of Mandate
The mandate will issue immediately when an appeal is dismissed (1) voluntarily, (2) for failure to pay the docket fee, (3) for failure to file the docketing statement under Circuit Rule 3(c), or (4) for failure by the appellant to file a brief.

OTHER

Cal Rev & Tax Code § 19271 (2001)

(a)(1) For purposes of this article:

"Child support delinquency" means a delinquency defined in Section 17501 of the Family Code.

"Earnings" may include the items described in Section 5206 of the Family Code.

(a)(2) In order to manage the growth in the number of delinquencies transferred, the Franchise Tax Board may phase in the transfers over a period of 36 months ending on December 31, 2002. The Legislature anticipates that the Franchise Tax Board's systems necessary to accommodate the augmented collection activities will be operational by July 1, 2001. The Franchise Tax Board shall work with the Department of Child Support Services to coordinate the phasein, focusing on needed coordination with the transition of the local child support agency in each county from the office of the district attorney to the new county department of child support services.

(a)(3) At least 20 days prior to the date that the Franchise Tax Board commences collection action under this article, the Franchise Tax Board shall mail notice of the amount due to the obligated parent at the last known address and advise the obligated parent that failure to pay will result in collection action. If the obligated parent disagrees with the amount due, the obligated parent shall be instructed to contact the local child support agency to resolve the disagreement.

(b)(1)

Except as otherwise provided in subparagraph (B), when a delinquency is transferred to the Franchise Tax Board pursuant to Section 17501 of the Family Code, the amount of the child support delinquency shall be collected by the Franchise Tax Board in any manner authorized under the law for collection of a delinquent personal income tax liability, except that issuance of an order and levy under Article 4 (commencing with Section 706.070) of Chapter 5

of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure in the manner provided for earnings withholding orders for taxes is prohibited. Any levy or other withholding of earnings of an employee by the Franchise Tax Board shall be made accordance with Section 5246 of the Family Code. Any other law providing for the collection of a delinquent personal income tax liability shall apply to any delinquency transferred under Section 17501 of the Family Code in the same manner and with the same force and effect and to the full extent as if the language of those laws had been incorporated in full into this article, except to the extent that any provision is either inconsistent with a provision of this article or is not relevant to this article.

When a delinquency is transferred to the Franchise Tax Board pursuant to Section 17501 of the Family Code, or at any time thereafter, if the obligated parent owes a delinquent personal income tax liability, the Franchise Tax Board shall not engage in, or shall cease, any involuntary collection action to collect the delinquent personal income tax liability, until the child support delinquency is paid in full. At any time, however, the Franchise Tax Board may mail any other notice to the taxobligor for voluntary payment of the delinquent personal income tax liability if the Franchise Tax Board determines that collection of the delinquent personal income tax liability will not jeopardize collection of the child support delinquency. However , the Franchise Tax Board may engage in the collection of a delinquent personal income tax liability if the obligor has entered into a payment agreement for the child support delinquency and is in compliance with that agreement, and the Franchise Tax Board determines that collection of the delinquent personal income tax liability would not jeopardize payments under the child support payment agreement.

For purposes of subparagraph (B):

"Involuntary collection action "includes those actions authorized by Section 18670, 18670.5, 18671, or 19264, by

Article 3 (commencing with Section 19231), or by Chapter 5 (commencing with Section 706.010) of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.
"Delinquent personal income tax liability" means any taxes, additions to tax, penalties, interest, fees, or other related amounts due and payable under Part 10 (commencing with Section 17001) or this part.
"Voluntary payment" means any payment made by obligated parents in response to any notice for voluntary payment mailed by the Franchise Tax Board.
(b)(2) Any compensation, fee, commission, expense, or any other fee for service incurred by the Franchise Tax Board in the collection of a child support delinquency authorized under this article shall not be an obligation of, or collected from, the obligated parent. A transferred child support delinquency shall be final and due and payable to the State of California upon written notice to the obligated parent by the Franchise Tax Board.
(b)(3) For purposes of administering this article:
This chapter and Chapter 7 (commencing with Section 19501) shall apply, except as otherwise provided by this article.
Any services, information, or enforcement remedies available to a local child support agency or the Title IV-D agency in collecting child support delinquencies or locating absent or noncustodial parents shall be available to the Franchise Tax Board for purposes of collecting child support delinquencies under this article, including, but not limited to, any information that may be disclosed by the Franchise Tax Board to the California Parent Locator Service under Section 19548. However, in no event shall the Franchise Tax Board take any additional enforcement remedies if a court has ordered an obligor to make scheduled payments on a child support arrearages obligation and the parent is in compliance with that order.
A request by the Franchise Tax Board for information from a financial institution shall be treated in the same manner and to the same extent as a request for information from a

local child support agency referring to a support order pursuant to Section 17400 of the Family Code for purposes of Chapter 20 (commencing with Section 7460) of Division 7 of Title 1 of the Government Code (relating to governmental access to financial records), notwithstanding any other provision of law which is inconsistent or contrary to this paragraph.

The amount to be withheld in an order and levy to collect child support delinquencies under Article 4 (commencing with Section 706.070) of Chapter 5 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure is the amount required to be withheld pursuant to an earnings withholding order for support under Section 706.052 of the Code of Civil Procedure.

Nothing in this article shall be construed to modify the tax intercept provisions of Article 8 (commencing with Section 708.710) of Chapter 6 of Division 2 of Part 2 of the Code of Civil Procedure.

(c) Interest on the delinquency shall be computed pursuant to Section 685.010 of the Code of Civil Procedure.

(d)(1) In no event shall a collection under this article be construed to be a payment of income taxes imposed under this part.

(d)(2) In the event an obligated parent overpays a liability imposed under this part, the overpayment shall not be credited against any delinquency collected pursuant to this article. In the event an overpayment of a liability imposed under this part is offset and distributed to a local child support agency pursuant to Sections 12419.3 and 12419.5 of the Government Code or Section 708.740 of the Code of Civil Procedure, and thereby reduces the amount of the referred delinquency, the local child support agency shall immediately notify the Franchise Tax Board of that reduction, unless the Franchise Tax Board directs otherwise.

(e)(1) The Franchise Tax Board shall administer this article, in conjunction with regulations adopted by the Department of Child Support Services in consultation with

the Franchise Tax Board, including those set forth in Section 17306 of the Family
Code.
(e)(2) The Franchise Tax Board may transfer to or allow a local child support agency to retain a child support delinquency for a specified purpose for enforcement and collection where the Franchise Tax Board determines, pursuant to regulations established by the Department of Child Support Services, that the transfer or retention of the delinquency for the purpose so specified will enhance the collectibility of the delinquency.
(e)(3) The Franchise Tax Board, in coordination with the local child support agency, shall seek full compliance by the obligor with the child support order. The Franchise Tax Board, in coordination with the local child support agency and the Department of Child Support Services, shall pursue resolution of any issues regarding wage assignments and shall modify or replace as necessary any administratively county-issued wage assignments to achieve total resolution of the child support obligation.
(f) Except as otherwise provided in this article, any child support delinquency transferred to the Franchise Tax Board pursuant to this article shall be treated as a child support delinquency for all other purposes, and any collection action by the local child support agency or the Franchise Tax Board with respect to any delinquency referred pursuant to this article shall have the same priority against attachment, execution, assignment, or other collection action as is provided by any other provision of state law.
(g) Except as otherwise specifically provided in subparagraph (B) of paragraph (1) of subdivision (b), the child support collection activities authorized by this article shall not interfere with the primary mission of the Franchise Tax Board to fairly and efficiently administer the Revenue and Taxation Code for which it is responsible.
(h) Information disclosed to the Franchise Tax Board shall be considered information that may be disclosed by the

Franchise Tax Board under the authority of Section 19548 and may be disseminated by the Franchise Tax Board accordingly for the purposes specified in Sections 17505 and 17506 of the Family Code (in accordance with, and to the extent permitted by, Section 17514 of the Family Code and any other state or federal law).
(i) A local child support agency may not apply to the Department of Child Support Services for an exemption from the transfer of responsibilities and authorities to the Franchise Tax Board under the Family Code or participation under Section 19271.6.
(j) Except in those cases meeting the specified circumstances described in the regulations and in accordance with the process prescribed in paragraph (2) of subdivision (d) of Section 17501 of the Family Code, a local child support agency shall not withdraw, rescind, or otherwise recall the transfer of a child support delinquency transferred to the Franchise Tax Board.

Cal Rev & Tax Code § 18670 (2001)
(a) The Franchise Tax Board may by notice, served personally or by first-class mail, require any employer, person, officer or department of the state, political subdivision or agency of the state, including the Regents of the University of California, a city organized under a freeholders' charter, or a political body not a subdivision or agency of the state, having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxobligor or to an employer or person who has failed to withhold and transmit amounts due pursuant to this article, to withhold, from the credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxobligor or the amount of any liability incurred by that employer or person for failure to withhold and transmit amounts due from a taxobligor under this part and to transmit the amount withheld to the Franchise Tax Board at the times that it may designate. However, in the

case of a depository institution, as defined in Section 19(b) of the Federal Reserve Act (12 U.S.C.A. Sec. 461(b)(1)(A)), amounts due from a taxobligor under this part shall be transmitted to the Franchise Tax Board not less than 10 business days from receipt of the notice. To be effective, the notice shall state the amount due from the taxobligor and shall be delivered or mailed to the branch or office reported in information returns filed with the Franchise Tax Board, or the branch or office where the credits or other property is held, unless another branch or office is designated by the employer, person, officer or department of the state, political subdivision or agency of the state, including the Regents of the University of California, a city organized under a freeholders' charter or a political body not a subdivision or agency of the state.

(b) (1) At least 45 days before sending a notice to withhold to the address indicated on the information return, the Franchise Tax Board shall request a depository institution to do either of the following:

Verify that the address on its information return is its designated address for receiving notices to withhold.

Provide the Franchise Tax Board with a designated address for receiving notices to withhold.

(b)(2) Once the depository institution has specified a designated address pursuant to paragraph (1), the Franchise Tax Board shall send all notices to that address unless the depository institution provides notification of another address. The Franchise

Tax Board shall send all notices to withhold to a new designated address 30 days after notification.

(b)(3) Failure to verify or provide a designated address within 30 days of receiving the request shall be deemed verification of the address on the information return as the depository institution's designated address.

(c) Any corporation or person failing to withhold the amounts due from any taxobligor and transmit them to the Franchise Tax Board after service of the notice shall be liable for those amounts. However, in the case of a

depository institution, if a notice to withhold is mailed to the branch where the account is located or principal banking office, the depository institution shall be liable for a failure to withhold only to the extent that the accounts can be identified in information normally maintained at that location
in the ordinary course of business.

STATEMENT OF THE CASE

Description

This case can be described as a civil rights claim for money damages (actual and punitive) and injunctive and declaratory relief under the United States Constitution, particularly pursuant to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, and under federal law, particularly pursuant to Title 42 of the United States Code, Section 1983 and Title 28 of the United States Code, Sections 2201 and 2202 for the purpose of enjoining said Defendants-Respondents from enforcing Sections 19271 and 18670 of the California Revenue and Taxation Code on the basis that the conduct, policies and practices of Defendants-Respondents have violated Plaintiff-Appellant's U.S. Constitutional Guarantee of Procedural Fairness flowing from the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution [*Plaintiff's First Amended Complaint*], where Plaintiff-Petitioner's prayer for relief sought a "preliminary and permanent injunction enjoining defendants (Stout and Lockyer) and employees/agents/officers of defendants (Franchise Tax Board, Attorney General's Office, San Bernardino, and District Attorney's Office), their agents, employees, and those acting in concert with them, from enforcing Sections 19271 and 18670 of the California Revenue and Taxation Code and collecting on any amount of child support arising from a 1986 Multnomah County, State of Oregon child support order in which Plaintiff-Petitioner is the obligor and Viki S. Hollander is the obligee." [*Plaintiff's First Amended Complaint*]. Jurisdiction in the United States District Court is based on federal question pursuant to 28 U.S.C. Section 1343.

In the instant case, it is alleged that public officials of the State of California and the County of San Bernardino have intentionally, wantonly, and with malice of

forethought unjustly exceeded their authority and power in their unlawful and unconstitutional efforts to collect nonexistent amounts of "delinquent child support obligation" for the purpose of obtaining increased federal incentive grant dollars for their child support enforcement efforts. Here, in a nutshell, employees of San Bernardino County, Child Support Enforcement and the State of California intentionally used judicial system and the long and powerful arm of the State of California to intentionally victimize Plaintiff-Appellant by taking the property of Plaintiff, a resident of the State of Illinois, without due process of law guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States, where the motivation for such acts was the resultant federal incentive grant subsidies received by the County of San Bernardino and the State of California for their child support enforcement efforts. **This case dramatically (and tragically) demonstrates how legitimate national policy concerns for child support enforcement, resulting in federal incentive grant subsidies for state and county child support enforcement efforts, have led to child support enforcement efforts that violate an obligor's due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.**

Facts

About December 1999, employees of San Bernardino County (Office of the District Attorney), State of California [including Defendant Stout] in a San Bernardino County Court "IV-D Case" registered a foreign 1986 Multnomah County, State of Oregon Child Support Order, for which Viki S. Hollander was the obligee and Plaintiff was the obligor. This act was known by such employees of San Bernardino County (Office of the District Attorney), State of California [including Defendant Stout]:

a. to have been accomplished without the notice, authorization, approval, permission, or acquiescence of either the obligor (Plaintiff) [Affidavit of Brad R. Johnson] or obligee (Viki S. Hollander) [Affidavit of Viki S. Hollander], which resulted in a default judgment against Plaintiff and
b. to have exceeded the authority and power of such employees of San Bernardino County (Office of the District Attorney), since in "IV-D Cases" the District Attorney does not represent the interests of either party.

Since December 1999, Plaintiff has been a target and victim of Defendants' unconstitutional, criminal and tortious schemes and artifices to defraud Plaintiff of his property, described as follows.

1. **On July 7, 2000,** *without any actual or constructive notice to Plaintiff,* the State of California, Franchise Tax Board, Child Support Collections issued an ORDER TO WITHHOLD (any credits or payments owing to Brad R. Johnson) under authorization of Sections 19271 and 18670 of the California Revenue and Taxation Code to U.S. Bank, Attn: Attachments & Garnishments, P.O. Box 14129, Portland, OR 97214, to enforce payment of a DELINQUENT FAMILY SUPPORT DEBT in the amount of $1,250 of DEBTOR, Brad R. Johnson. This ORDER TO WITHHOLD was forwarded to Plaintiff in Kankakee, Illinois by U.S. Bank and received by Plaintiff on July 15, 2000. It is important to note that the ORDER TO WITHHOLD had a Milledgeville, Georgia address, which was 7 years old. [Affidavit of Brad R. Johnson].
2. **On July 17, 2000,** Brad R. Johnson informed employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) and employees of the Franchise Tax Board, Child Support Collections by telephonic communication that in fact no delinquent child support amount

existed (or ever existed) and that they had made a terrible mistake. Further, Plaintiff informed employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) of his current address in Kankakee, Illinois. These employees told Plaintiff that Plaintiff would need to prove to them (in the form of cancelled checks) that he had paid his child support. [Affidavit of Brad R. Johnson].

3. **On July 28, 2000,** Viki S. Hollander informed Employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) by E-mail and telephonic communication that no delinquent child support amount existed (or ever existed) and that they had made a terrible mistake. [Affidavit of Viki S. Hollander].
4. **On July 31, 2000,** Plaintiff sent a Demand Letter dated July 30, 2000 to (i) the Franchise Tax Board, Child Support Collections by FedEx Priority Overnight (5574782625) and (ii) the San Bernardino District Attorney's Office - Child Support Enforcement by FedEx Priority Overnight on July 31, 2000 (5574782636) as a result of their joint violation of Plaintiff's civil rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Plaintiff included his current address in the Demand Letters. [Affidavit of Brad R. Johnson].
5. **On May 8, 2001,** *without any actual or constructive notice to Plaintiff,* the State of California, Franchise Tax Board, Child Support Collections issued another ORDER TO WITHHOLD (any credits or payments owing to Brad R. Johnson) under authorization of Sections 19271 and 18670 of the California Revenue and Taxation Code to U.S. Bank, Attn: Attachments & Garnishments, P.O. Box 14129, Portland, OR 97214, to enforce payment of a DELINQUENT FAMILY SUPPORT DEBT in the

amount of $4,225 of DEBTOR, Brad R. Johnson. This ORDER TO WITHHOLD was forwarded to Plaintiff in Kankakee, Illinois by U.S. Bank and received by Plaintiff on May 21, 2001. It is important to note that the ORDER TO WITHHOLD had a Milledgeville, Georgia address, which was 7 years old. Purposefully, neither the employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) nor employees of the Franchise Tax Board, Child Support Collections updated their records to include Plaintiff's current address. [Affidavit of Brad R. Johnson]. It follows that any required due process notice was not sent to Plaintiff's last known address and accordingly Defendants' have intentionally and necessarily violated Plaintiff's due process guarantee under the Fifth and Fourteenth Amendments to the U.S. Constitution.

6. **On June 13, 2001,** Plaintiff filed his original petition in this case against certain public officials of the State of California and the County of San Bernardino.
7. **On October 2, 2001,** Plaintiff received a Federal Income Tax Refund Check in the amount of $1,854. Along with the check came a letter from the Department of the Treasury stating that Plaintiff's Federal Income Tax Receivable in the amount of $5,235 had been taken (reduced) to the extent of $3,381 by Child Support Services; 10417 Mountain View Avenue; Loma Linda, CA 92354-2030. This alleged delinquent child support obligation DID NOT EXIST. Further, employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) knew that such delinquent child support obligation did not exist, since they received a copy of the Affidavits of Brad R. Johnson and Viki S. Hollander about July 30, 2001. In

addition, the letter from the Department of the Treasury stated:

> " The Agency has previously sent notice to you at the last address known to the Agency. That notice explained the amount and type of debt you owe, the rights available to you, **and that the agency intended to collect the debt by intercepting any Federal payments made to you, including tax refunds."**

Plaintiff has never received a notice from "Child Support Services" (or any other state or federal agency) that "explained the amount and type of debt you owe, the rights available to you, and that the agency intended to collect the debt by intercepting any Federal payments made to you, including tax refunds." ***As of September 24, 2002 employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) are still in possession of my Federal Income Tax Refund of $3381.***

The Rulings Below

The District Court

On August 28, 2001, with a view toward transferring the instant case no matter what the cost, United States Magistrate Judge, David G. Bernthal, filed his *Report and Recommendation*. This *Report* falsely stated that Defendants moved the District Court "to transfer the proceedings to the United States District Court for the Central District of California **pursuant to 28 U.S.C. Section 1404 because all Defendants reside in California and a substantial part of the events occurred there."** In fact, Defendants moved the District Court to transfer the proceedings to the United States District Court for the Central District of California **pursuant to 28 U.S.C. Section**

1406(a) because it is the district in which all of the defendants reside or do business pursuant to 28 U.S.C. Section 1391(a). The *Report* concludes by granting the *Motion for Change of Venue* under *28 U.S.C. Section 1404 [not U.S.C. Section 1406(a)]*, where the *Report* found venue controlled by *28 U.S.C. Section 1391(b) [not by 28 U.S.C. Section 1391(a)]*.

As permitted by Fed.R.Civ.P. 72(b), on September 17, 2001, Plaintiff filed *Plaintiff's Objection to the Report and Recommendation of the United States Magistrate Judge, David G. Bernthal and Motion to Reconsider.*

On September 19, 2001, the District Court entered an unpublished *Order* [hereinafter referred to as the *District Court's September 19th Order*, wherein "[a]fter a thorough and careful de novo review," the District Court:

1. GRANTED Defendants' *Motion for Change of Venue* and ordered the instant case transferred to the Central District of California pursuant to 28 U.S.C. Section 1406(a), where the District Court identified 28 U.S.C. Section 1391(b) as controlling venue and specifically found:
    a. "Plaintiff is correct that Defendants did not ask this court to transfer venue pursuant to 28 U.S.C. Section 1404(a)."
    b. "Defendants incorrectly argued that Plaintiff based 'the venue of the present action in large part upon the court's diversity jurisdiction [28 U.S.C. Section 1391(b)].'"
2. DENIED *Plaintiff's Motion to File Amended Complaint*, where the District Court specifically found "that it is unlikely that Plaintiff left out of his Complaint any material events giving rise to the claim that would connect this claim to the Central District of Illinois."

On September 19, 2001, JOHNSON filed *Plaintiff's First Amended Complaint.*

On October 2, 2001, JOHNSON filed a motion for reconsideration of the *District Court's September 19th Order*, raising the following four objections to the District Court's application of law.

1. A CLEAR LEGAL ERROR: No Opportunity to be Heard. On the issue of the District Court's transfer for improper venue arising from the tandem application of 28 U.S.C. Section 1406(a) and 28 U.S.C. Section 1391(b).
2. A CLEAR LEGAL ERROR: No Opportunity to be Heard. On the issue of whether *Plaintiff's First Amended Complaint* provided for proper venue in the District Court.
3. MISAPPLICATION OF VENUE LAW: 28 U.S.C. Section 1391(b)(2). On the issue of the District Court's interpretation of "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."
4. MISAPPLICATION OF VENUE LAW: 28 U.S.C. Section 1391(b)(2). On the issue of the District Court's interpretation of "a substantial part of property that is the subject of the action is situated."

On October 30, 2001, the District Court filed an unpublished *Order* [hereinafter referred to as the *District Court's October 30th Order*, wherein the District Court found that Plaintiff "had the right to amend his 'pleading once as a matter of course at any time before a responsive pleading is served'" under Fed.R.Civ.P. 15(a). Accordingly, "Plaintiff should have been allowed to file an amended complaint." **However, the District Court did not allow JOHNSON an opportunity to be heard on *Plaintiff's First Amended Complaint* with respect to the issue of improper venue and a resulting transfer pursuant to 28 U.S.C. Section 1406(a), where venue is controlled by 28 U.S.C. Section 1391(b)(2).** Instead, the District Court summarily rejected venue as being proper in the District Court by stating that the District Court has "carefully

considered all of the allegations included in *Plaintiff's First Amended Complaint,*" where such complaint "does not add any allegations that any of 'the events or omissions giving rise to the claim occurred' in this district. See 28 U.S.C. Section 1391(b)(2). This court specifically notes that Plaintiff does not allege that any of Defendants' actions took place in Illinois. **There are no allegations that Defendants sent anything to him in Illinois** or made any telephone calls to him in Illinois. Accordingly, this court again concludes that venue is not proper in this district." IT IS THEREFORE ORDERED THAT . . . (2) *Plaintiff's Motion for Reconsideration* (#18) is DENIED as to Plaintiff's request that this court reconsider its *Order* that granted *Defendant's Motion for Change of Venue* (#4). This case is transferred to the Central District of California pursuant to 28 U.S.C. Section 1406(a)."

On November 26, 2001, Plaintiff-Appellant filed an appeal to the United States Court of Appeals for the Seventh Circuit from the *District Court's October 30th Order*:

1. GRANTING Plaintiff's Motion for Reconsideration (#18) of the District Court's Order (#16) denying Plaintiff's Motion to File Amended Complaint (#7) and now granting Plaintiff's Motion to File Amended Complaint (#7) and
2. DENYING Plaintiff's Motion for Reconsideration (#18) of the District Court's Order (#16) granting Defendants' Motion for Change of Venue (#4) and accordingly transferring the instant case to the Central District of California pursuant to 28 U.S.C. Section 1406(a).

Plaintiff contended that the Circuit Court had the following two independent and alternative bases upon which to assert jurisdiction [Plaintiff-Appellant's Petition for Rehearing] and review the *District Court's October 30th Order* granting *Defendants' Motion for Change of Venue* and a plenary transfer of the case under Section 1406(a).

1. Such order has the practical effect of denying Plaintiff's prayer for temporary and injunctive

relief and therefore such order was immediately appealable under 28 U.S.C. Section 1292(a)(1) and Carson v. American Brands, Inc., 450 U.S. 79, 83-84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981).

2. Under the collateral order doctrine of Cohen v Beneficial Industrial Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), such order is treated as final under 28 U.S.C. Section 1291 because such order (i) deals with a serious and unsettled question and (ii) has the required characteristics of being separable, final and unreviewable.

The Circuit Court completely ignored these bases for jurisdiction and on February 4, 2002 entered an unpublished order **(Appendix A, page A-2)** dismissing the appeal for lack of jurisdiction, as follows.

> "An order transferring a case to another federal district court is not immediately appealable. See *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F. 3d 755, 762 n. 14 (7th Cir. 1994); *Graphics Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985).

However, in both of these cited cases [*In re Joint Eastern & Southern Districts Asbestos Litigation* and *Graphics Communications Union*] dealt with a transfer order under Section 1404(a) [a transfer for convenience, essentially a change in courtroom location]. In stark contrast, the instant case deals with a transfer order under Section 1406(a) [a transfer because of improper venue, with definite and substantive legal effects].

Plaintiff filed a *Petition for Rehearing* on February 19, 2002, which was denied in an unpublished Order of the United States Court of Appeals for the Seventh Circuit entered on April 2, 2002 **(Appendix A, page A-4)**. Mandate issued on April 3, 2002 **(Appendix A, page A-6)**.

Because Plaintiff wanted to file a *Petition for Writ of Mandamus*, but was prevented from doing so because the Court's mandate had issued, on April 9, 2002 Plaintiff filed a *Motion to Recall the Mandate and to Stay the Proceedings to*

Allow Time for Plaintiff to file his Petition for Writ of Mandamus. On April 24, 2002 the Circuit Court entered an unpublished order **(Appendix A, page A-8)** denying Plaintiff's Motion to Recall the Mandate.

On May 1, 2002 Plaintiff filed a *Motion to Recall the Mandate and to Stay the Proceedings to Allow Time for Plaintiff to file his Petition for Writ of Certiorari*. In Plaintiff's Motion to Recall the Mandate, Plaintiff observed that the Circuit Court's practice of issuing mandate violates Rule 41(b) of the Federal Rules of Appellate Procedure and Circuit Rule 41.

REASONS FOR GRANTING THE WRIT

Dr. Brad R. Johnson, the Plaintiff-Appellant-Petitioner, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered in this case on February 4, 2002, dismissing the appeal for lack of jurisdiction. This order should be reviewed by this honorable Court because of the compelling reasons that follow from the Questions Presented, as described below.

Rendered Decision of the United States Court of Appeals for the Seventh Circuit has decided an important question of federal law in a way that conflicts with Relevant Decisions of the Supreme Court

I.

The Supreme Court has held that appellate review by the United States Court of Appeals for the Seventh Circuit of the *District Court's October 30th Order* is obtained under 28 U.S.C. Section 1292(a)(1), if the order has both the effect of an injunction and has "serious, perhaps irreparable, consequences." Carson v. American Brands, Inc., 450 U.S. 79, 83-84, 67 L. Ed. 2d 59, 101 S. Ct. 993 (1981). Thus, 28 U.S.C. Section 1292(a)(1) provides appellate jurisdiction over orders that:

- grant or deny injunctions and
- have the **practical effect** of granting or denying injunctions and have "serious, perhaps irreparable, consequences." Id. at 84.

In the instant case, the District Court's order to grant Defendants-Respondents' Motion for Change in Venue under 28 U.S.C. Section 1406(a) has the **practical effect** of refusing to grant an injunction. Moreover, "serious, perhaps irreparable, consequences" are found in the continuing unlawful and unconstitutional efforts of Defendants-Respondents in enforcing Sections 19271 and 18670 of the California Revenue and Taxation Code against Plaintiff-Petitioner and in the process violating Plaintiff-Petitioner's U.S. Constitutional Guarantee of Procedural Fairness flowing from the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Specifically, "serious, perhaps irreparable, consequences" are found in Defendants' conduct, as follows: In October 2001, Defendants-Respondents violated Plaintiff-Petitioner's liberty interest by depriving Plaintiff of his property without due process of law (i.e., seizing Plaintiff's Federal Individual Income Tax Receivable to the extent of $3,381, which would have been deposited in his personal U.S. Bank checking account (Account Number 153604326949). If the District Court had issued a temporary injunction against Defendants-Respondents, such seizure and deprivation of Plaintiff-Petitioner's constitutional rights would not have occurred. It is painfully obvious that, other than in the judiciary, there is no check on the unconstitutional exercise of state power. And in the instant case, there is no reason to believe that Defendants-Respondents will terminate their unlawful, fraudulent, tortuous, and unconstitutional conduct.

Further, this case is immediately appealable only to United States Court of Appeals for the Seventh Circuit [28 U.S.C. Section 1294(1)]. If this case were to be transferred to the U.S. District Court for the Central District of

California, the Court of Appeals for the Ninth Circuit, as the transferee court of appeals, would not entertain an appeal from the Illinois District Court's effective denial of Plaintiff's prayer for injunctive relief, because such decision was immediately appealable. 28 U.S.C. Sections 1292(a)(1) & 1294(1). Thus, if the Court of Appeals for the Seventh Circuit does not take jurisdiction over this matter, Plaintiff's Choice of Law is lost forever, which represents another **"serious, perhaps irreparable, consequence."**

Rendered Decision of the United States Court of Appeals for the Seventh Circuit that Overlooks a Clear Distinction which Supreme Court Cases have Drawn and in doing so Creates a Conflict among the Circuits on an Issue
and
Rendered Decision of the United States Court of Appeals for the Seventh Circuit that is in Conflict with the Decision of Another Court of Appeals on the Same Important Matter

II.

Appellate review by the United States Court of Appeals for the Seventh Circuit of the *District Court's October 30th Order* is obtained under *Cohen v Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), where such order is treated as final under 28 U.S.C. Section 1291, since such order (i) deals with a serious and unsettled question and (ii) has the required characteristics of being separable, final and unreviewable. **Separability.** In the instant case, each of the venue issues concerning the substantive interpretation of the procedural and tandem application of 28 U.S.C. Section 1391(b)(2) and 28 U.S.C. Section 1406(a) arising from said order, are independent of the cause of action and will not be merged into the final judgment, if the proceeding is transferred to the U.S. District Court for Central District of California. **Finality.** In the instant case, if each of the venue issues concerning the substantive interpretation of the procedural

and tandem application of 28 U.S.C. Section 1391(b)(2) and 28 U.S.C. Section 1406(a) arising from said order was adjudicated by the United States Court of Appeals for the Seventh Circuit, such adjudication would constitute a final disposition of each venue issue.

Unreviewability. In the instant case, each of the venue issues concerning the substantive interpretation of the procedural and tandem application of 28 U.S.C. Section 1391(b)(2) and 28 U.S.C. Section 1406(a) arising from said order would be unreviewable on appeal in the Ninth Circuit, the court of appeals for the transferee district court. A transferee district court lacks jurisdiction to review a transfer order from a district court sitting outside its circuit. 28 U.S.C. Section 1294(1). Also see Moses v. Business Card Express, Inc., 929 F. 2d 1131, 1136 (6th Cir.), cert. denied, 116 L. Ed. 2d 54, 112 S. Ct. 81 (1991); Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F. 2d 982, 985-86 (11th Cir. 1982); Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc., 436 F. 2d 1180, 1188 (7th Cir.), cert. dismissed, 403 U.S. 942 (1971); Technitrol, Inc. v. McManus, 405 F. 2d 84, 87 (8th Cir. 1968) (expressing doubt that this court has the authority to review a transfer order from a district court in another circuit), cert. denied, 394 U.S. 997, 22 L. Ed. 2d 775, 89 S. Ct. 1591 (1969). Further, if Circuit Court's Order stands, Plaintiff-Respondent's choice of law and opportunity to be heard will be lost forever. Van Dusen v. Barrack, 376 U.S. 612, 642, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964).

Serious and Unsettled Question. In the instant case, each of the issues concerning the substantive interpretation of the procedural and tandem application of 28 U.S.C. Section 1391(b)(2) and 28 U.S.C. Section 1406(a) arising from said order is unsettled in the lower federal courts [transfer orders under 28 U.S.C. Section 1406(a) and 28 U.S.C. Section 1404(a) have engendered a complex and somewhat conflicting pattern of reviewability] and has serious federalism implications, which may be settled once and for all by this Court.

Based upon the above arguments (I. And II.), this Court should:

- Grant Petitioner's Writ of Certiorari because the Court of Appeals for the Seventh Circuit has rendered a decision (lack of jurisdiction) concerning a significant matter (violation of Plaintiff-Petitioner's liberty interests) in conflict with *Carson* and *Cohen* and
- Mandate that the Court of Appeals for the Seventh Circuit has jurisdiction in the instant case because of the difference in substantive legal effect between a transfer for improper venue under 28 U.S.C. Section 1406(a) and a transfer for convenience under 28 U.S.C. Section 1404(a).

To Settle Important Questions of Practice under the Federal Rules of Appellate Procedure
and
Rendered Decision of the United States Court of Appeals for the Seventh Circuit that has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision

III.

This honorable Court should grant Petitioner's Writ of Certiorari because the Court of Appeals for the Seventh Circuit has exceeded its authority in clear violation of Rule 41(b) of the Federal Rules of Appellate Procedure and Circuit Rule 41 by having the Clerk of the United States Court of Appeals for the Seventh Circuit follow such Circuit Court's practice to issue mandate one day after the Order denying a Petition for Rehearing is entered, thereby precluding Plaintiff-Respondent from filing his Petition for a Writ of Mandamus.

To Settle Important Questions of Practice under the Federal Rules of Civil Procedure
and
Rendered Decision of the United States District Court for the Central District of Illinois that has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision

IV.

This honorable Court should grant Petitioner's Writ of Certiorari in furtherance of justice to correct excesses because it was clear legal error under Fed.R.Civ.P. 15(a) and the Due Process Clause of the Fifth Amendment of the U.S. Constitution for the United States District Court for the Central District of Illinois to deny Plaintiff **an opportunity to be heard** on Plaintiff's First Amended Complaint [with respect to the issue of improper venue and a resulting transfer pursuant to 28 U.S.C. Section 1406(a), where venue is controlled by 28 U.S.C. Section 1391(b)(2)] **after the District Court reversed its position and determined that Plaintiff's *Motion to File Amended Complaint* should have been granted.**

Rendered Decision of the United States District Court for the Central District of Illinois has Decided an Important Question of Federal Law in a way that Conflicts with Relevant Decisions of the Other Courts

V.

In the instant case, the United States District Court for the Central District of Illinois found venue improper. However, this District Court applied an incorrect and obsolete standard in determining that venue was improper under 28 U.S.C. Section 1391(b)(2). Under the 1990 Amendment to 28 U.S.C. Section 1391(b)(2), district courts should no longer ask which district among the two or more potential forums is the best venue. Rather, they should ask whether the district that the plaintiff chose had a substantial connection to the claim, whether or not other

forums had greater contacts. *Bates v. C & S Adjusters, Inc.*, 980 F. 2d 865, 866-68 (2d Cir. 1992) (noting that "the new statute does not, as a general matter, require the District Court to determine the best venue").

The statutory standard of the current venue statute focuses *not* on whether a defendant has made a deliberate contact--a factor relevant in the analysis of personal jurisdiction--but on the location where events occurred. Under the new version of 28 U.S.C. Section 1391(b)(2), a court must determine only whether a substantial part of the events giving rise to the claim occurred in Plaintiff's chosen forum. In cases where a plaintiff is alleging violations under the FDCPA, courts have found venue to lie based on a single act directed by the defendant/creditor to plaintiff's state of residence. See *Bates v. C&S Adjusters, Inc.*, 980 F. 2d 865, 868 (2nd. Cir. 1992) (a collection letter forwarded to Plaintiff's new state of residence sufficient for venue in that state). Accordingly, *Bates* is direct authority for the proposition that venue is proper in the instant case.

In *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F. 3d 135, 153 (2d Cir. 2001) (quoting this conclusion from *Bates*), many of Zhen Hua's communications reached Titan's offices in New York through the Connecticut brokers. However, this did not alter the fact that Zhen Hua directed communications to New York. Accordingly, venue in the Southern District of New York was proper. Also see *Bailey v. Clegg, Brush and Assoc., Inc.*, 1991 U.S. Dist. LEXIS 21591, No 1:90- CV-2702-CAM, 1991 WL 143461, at *2 (N.D.Ga. June 14, 1991); *Murphy v. Allen County Claims & Adjustments*, 550 F. Supp. 128, 130-31 (S.D. Ohio 1982). See also *Vlasak v. Rapid Collection Systems, Inc.*, 962 F. Supp. 1096, 1102 (7th Cir. 1997) ("When an individual receives calls or letters from a distant collection agency -- and when those calls or letters are allegedly illegal under the FDCPA -- it makes sense to permit the individual to file suit where he receives the communications."). Thus, it is nonsensical to permit defendant-debt collectors to engage in practices that may

violate the FDCPA and harass persons in other districts, and then force such persons to come to the defendants' district to bring action against them, where the activities that transpired in the district were not insubstantial in relation to the totality of events giving rise to the plaintiff's grievance. Again, here, these cases provide direct authority for the proposition that venue is proper in the instant case.

In *U.S. v Hartbrodt*, 773 F. Supp. 1240 (SD Iowa 1991), the government alleged that Hartbrodt had been engaging in a scheme to defraud. When Hartbrodt moved to transfer venue, asserting that venue was improper in the district under 28 U.S.C. Section 1391(b), Hartbrodt argued that the events occurring in Iowa were not "substantial." In deciding whether or not events were substantial, the court first determined what events gave rise to the government's claim, alleging violations of the mail fraud statute, 18 U.S.C. Section 1341, and the wire fraud statute, 18 U.S.C. Section 1343. Therefore, in *Hartbrodt*, even one act involving the use of the mails or the telephone supported the government's claim for an injunction, assuming it was part of a scheme or artifice to defraud.

In *Stroman Reality, Inc. v. Antt Jr., et al.*, 20 F. Supp. 2d 1050 (DC Tex 1998), defendants used Texas law and the Texas government in their deliberate efforts to regulate Stroman. Defendants argued that a substantial part of events giving rise to the claim--the enforcement of their regulations--occurred in their states. The court disagreed. It stated that Stroman complained of what the defendants had done in Texas: trying to regulate his business in Texas with non-Californians and non-Floridians that happen to involve property in the defendants' states. Because the contested regulation included invoking Texas government to regulate Stroman, the court determined that venue was wholly proper in Texas.

Again, here, these cases provide direct authority for the proposition that venue is proper in the instant case. In the present action, since deprivation, damage, and harm are necessary elements of the legal theories invoked,

claims of violations of constitutional guarantees under the Fifth and Fourteenth Amendments of the U.S. Constitution arise where the locus criminis or the locus in quo of such deprivation, damage, and/or harm occurs. In the present action, that place is Kankakee County, State of Illinois. Thus, venue is proper in the District Court for the Central District of Illinois under 28 U.S.C. Section 1391(b)(2).

In addition, Plaintiff-Respondent possesses the drafts of $60 and $3381 representing the monies that were taken from Plaintiff-Petitioner by Defendants-Respondents. Accordingly, venue is proper under 28 U.S.C. Section 1391(b)(2), since a substantial part of the property that is the subject of the action (i.e., the $60 draft) is situated within the jurisdictional area of the District Court for the Central District of Illinois.

Accordingly, for the above reasons, this honorable Court should grant Petitioner's Writ of Certiorari to correct the **District Court's Erroneous Statutory Construction of the venue statute, 28 U.S.C. Section 1391(b)(2), which created an Erratic Ruling Likely to have Serious Adverse Effects.**

CONCLUSION/SUMMARY

Petitioner contends:

- Proper development of the law requires that the Supreme Court answer the Questions Presented.
- The Questions Presented:
    - address problems beyond the academic or the episodic and
    - Involve Principles, the settlement of which is important to the public as distinguished from the parties.
- There are subtle and important questions of practice dealing with the Federal Rules of Civil (and Appellate) Procedure that is best for the Supreme Court to address. In the past, this Court

has not hesitated to reverse a District Court where it concludes that an action of the District Court did not comply with a provision of the Federal Rules of Civil Procedure. The same should hold true for the Courts of Appeal and the Federal Rules of Appellate Procedure.

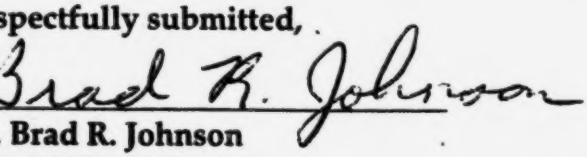
- In this case, an opportunity is afforded to resolve a conflict between the Circuits on the reviewability of transfer orders. Efforts by various lower courts to effect a resolution have given rise to a variety of inconsistent opinions resulting from those courts' attempts to apply decisional authority of this Court, whose holdings themselves do not readily mesh to guide such resolution. Within this context, lower courts have seized upon this Court's rhetoric, rather than its logic. For example, lower courts have raised generic terms like "transfer" to the status of a rule of law and have applied this rule to all types of transfers, totally disregarding legal effect. An approach to the resolution of claims of competing interests, which focuses on generic concepts, invites judicial discord, since the decisional variable lacks even intuitive appropriateness to the problems that they are supposed to resolve. A compelling need therefore exists both to reconstruct a principle or a series of principles to govern the reviewability of transfers and to discontinue reliance on generic terms like "transfer" that is inappropriate to a resolution of the situations to which courts have with increasing difficulty applied.

Accordingly, given:

- **that the Questions Presented are substantial and novel and had occasioned a split of authority among the lower federal courts,**
- **the need for uniform enforcement of the federal common law and the Federal Rules of Civil (and Appellate) Procedure**

the petitioner respectfully prays that its petition for a Writ of Certiorari be granted.

Respectfully submitted,



Dr. Brad R. Johnson
Plaintiff Pro Se
935 S. Wildwood Ave
Kankakee, IL 60901
(610) 683-1369

Dated: September 24, 2002

APPENDIX [A]
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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 4, 2002

Before

Hon. John L. Coffey, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana diamond Rovner, Circuit Judge

BRAD R. JOHNSON, Plaintiff-Appellant	]	Appeal from the United States District Court for the Central District of Illinois.
No. 01-4100 v.	]	
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, BILL LOCKYER, Attorney General, Office of the Attorney General, Department of Justice, State of California, et al., Defendants-Appellees.	]	No. 01 C 2145 Michael P. McCuskey, Judge.

ORDER

On consideration of the papers filed by the parties addressing the issue of appellate jurisdiction, and review of the short record,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

An order transferring a case to another federal district court is not immediately appealable. See *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F.3d 755, 762 n. 14 (7th Cir. 1994); Graphics Communications Union v. Chicago Tribune Co., 779 F.2d 13, 15 (7th Cir. 1985).

Plaintiff-appellant in the present case appeals such an order. This appeal, therefore, is premature because plaintiff-appellant's case is not at an end; it continues albeit in another federal court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 4, 2002

Before

Hon. John L. Coffey, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana diamond Rovner, Circuit Judge

BRAD R. JOHNSON, Plaintiff-Appellant	Appeal from the United States District Court for the Central District of Illinois.
No. 01-4100 v.	
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, BILL LOCKYER, Attorney General, Office of the Attorney General, Department of Justice, State of California, et al., Defendants-Appellees.	No. 01 C 2145 Michael P. McCuskey, Judge.

ORDER

On consideration of the "PLAINTIFF-APPELLANT'S PETITION FOR REHEARING" filed on February 19, 2002, along with the "PLAINTIFF-APPELLANT'S SEPARATE APPENDIX" also filed on February 19, 2002, the "OPPOSITION OF DEFENDANTS-APPELLEES COUNTY OF SAN BERNARDINO,

AND DENNIS L. STOUT TO PETITION FOR REHEARING OF PLAINTIFF-APPELLANT BRAD R. JOHNSON" filed on March 5, 2002, and the "APPELLANT'S REPLY TO OPPOSITION OF DEFENDANTS-APPELLEES COUNTY OF SAN BERNARDINO, AND DENNIS L. STOUT TO PETITION FOR REHEARING OF PLAINTIFF-APPELLANT BRAD R. JOHNSON" also filed on March 5, 2002,

IT IS ORDERED that the "PLAINTIFF-APPELLANT'S PETITION FOR REHEARING" is DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

DATE: April 3, 2002

TO: John M. Waters
United States District Court
Central District of Illinois
Suite 218
201 S. Vine Street
U.S. Courthouse
Urbana, IL 61802-3369

FROM: Gina J. Agnello, Clerk

RE: 01-4100
Johnson, Brad R. v. Franchise Tax Bd
01 C 2145, Michael P. McCuskey, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[X] No record filed
[ ] Original record on appeal consisting of:

ENCLOSED:		TO BE RETURNED AT LATER DATE:
[ ]	Volumes of pleadings	[ ]
[ ]	Loose pleadings	[ ]
[ ]	Volumes of transcripts	[ ]
[ ]	Volumes of exhibits	[ ]
[ ]	Volumes of depositions	[ ]
[ ]	In Camera material	[ ]

[ ] Other _____ [ ]

_____

Record being retained for use [ ]
in Appeal No. _____

Copies of this notice sent to: Counsel of record

[ ] United States Marshal

[ ] United States Probation Office

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: _____ _____

(1071-120397) Deputy Clerk,
U.S. District Court

UNITED STATES COURT OF APPEALS ts
For the Seventh Circuit
Chicago, Illinois 60604

April 24, 2002

By the Court:

BRAD R. JOHNSON, Plaintiff-Appellant	]	Appeal from the United States District Court for the Central District of Illinois.
No. 01-4100 v.	]	
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, BILL LOCKYER, Attorney General, Office of the Attorney General, Department of Justice, State of California, et al., Defendants-Appellees.	]	No. 01 C 2145 Michael P. McCuskey, Judge.

Upon consideration of the **APPELLANT'S MOTION TO RECALL MANDATE AND MOTION TO STAY PROCEEDINGS TO ALLOW TIME TO FILE WRIT OF MANDAMUS**, filed on April 9, 2002, by the pro se appellant,

IT IS ORDERED that the motions are **DENIED.**

Supreme Court, U.S.
FILED

(2) 02 860 JUL 1 2002

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

BRAD R. JOHNSON,

Plaintiff

v.

FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

BILL LOCKYER,

DENNIS L. STOUT,

COUNTY OF SAN BERNARDINO,
STATE OF CALIFORNIA,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

Dr. Brad R. Johnson
Plaintiff Pro Se
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Kankakee, IL 60901
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27 pp

SUPPLEMENTAL APPENDIX [A]
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Order of Judge McCuskey
Granting Plaintiff's Motion for Reconsideration
Filed on October 30, 2001 ..... A-23

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

BRAD R. JOHNSON,)
Plaintiffs,)
v.)
FRANCHISE TAX BOARD,)
STATE OF CALIFORNIA;)
OFFICE OF THE)
ATTORNEY GENERAL,)
DEPARTMENT OF JUSTICE,)
STATE OF CALIFORNIA;)
BILL LOCKYER,)
ATTORNEY GENERAL,)
DEPARTMENT OF JUSTICE,)
STATE OF CALIFORNIA;)
DENNIS L. STOUT, OFFICE)
OF THE DISTRICT)
ATTORNEY, COUNTY OF)
SAN BERNARDINO, STATE)
OF CALIFORNIA; OFFICE)
OF THE DISTRICT)
ATTORNEY, COUNTY OF)
SAN BERNARDINO, STATE)
OF CALIFORNIA; and)
COUNTY OF SAN)
BERNARDINO, STATE OF)
CALIFORNIA,)
)
Defendants)

FILED
AUG 28 2001
John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

Case No. 01-2145

REPORT AND RECOMMENDATION

In June 2001, Plaintiff, Brad R. Johnson, filed a Complaint and Demand for Jury Trial (#1) against

Defendants Franchise Tax Board of the State of California; Office of the Attorney General, California Department of Justice; Bill Lockyer, California Attorney General; Dennis L. Stout, Office of the District Attorney for San Bemardino County, California; Office of the District Attorney for San Bernardino County, California; and County of San Bernardino, California.

In July 2001, Defendant County of San Bernardino (including the Office of the District Attorney and Dennis Stout) filed a Motion To Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue (#4). Plaintiff then filed a Motion To File Amended Complaint (#7). After reviewing the parties' pleadings and memoranda, this Court recommends, pursuant to its authority under 28 U.S.C. § 636(b)(1)(B), that Defendant's Motion To Dismiss (#4-1) be **DENIED** and Defendant's Motion for Change of Venue (#4-2) be **GRANTED**. The Court also recommends that Plaintiffs Motion To Amend (#7) be **DENIED**.

I. Background

Plaintiff's 48-page complaint alleges that Defendants violated RICO and violated his constitutional rights under the Fifth and Fourteenth Amendments, and also alleges defamation and intentional infliction of emotional distress. Jurisdiction is based on federal question.

II. Standards of Review

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Miller v. Reebie Storage and Moving Company, Inc.*, No. 93C3986, 1993 WL 414689, at *1 (N.D. Ill. October 15, 1993). When considering a motion to dismiss, the Court must accept as true all well-pleaded factual allegations in the claims, and draw all reasonable inferences in the light most favorable to the nonmoving party. *Gutierrez v. Peters*, 111 F.3d 1364, 1368-69 (7th Cir. 1997). The Court should dismiss the claim only if the nonmoving party can prove no set of facts consistent with

the allegations of the complaint that would entitle him to relief. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319-20 (7th Cir. 1997).

The party requesting a transfer of venue bears the burden of showing that a different venue is "clearly more convenient." *Heller Fin. Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1293 (7th Cir. 1989); *Pasulka v. Sykes*, 131 F. Supp. 2d 988, 994 (N.D. Ill. 2001). In addition, a plaintiff's selected venue "is given deference, unless it lacks any significant contacts with the claim." *Id.* at 995.

III. Discussion

A. Motion To Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue

Defendant argues that Central District of Illinois should dismiss the case based on improper venue under 28 U.S.C. § 1391. Alternatively, it asks the Court to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1404 because all Defendants reside in California and a substantial part of the events occurred there.

As a preliminary matter, the Court notes that, in arguing that venue is proper in the Central District of Illinois, Plaintiff presents a number of arguments related to jurisdiction. No one disputes that federal courts have federal question jurisdiction over the claims in this case pursuant to 28 U.S.C. § 1343. The propriety of venue in the Central District of Illinois is the issue here, not the existence of federal jurisdiction.

The applicable statute governing venue when jurisdiction is based on federal question is 28 U.S.C. 1391(b), which provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the

> action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Plaintiff contends that subsection (2) of the statute applies because the claim arose in the Central District of Illinois. Specifically, he contends that the claim arose in the Central District because the injury occurred there. Therefore, his choice of venue is proper. He apparently concludes that the injury "occurred" in Illinois because that is where he lives and he is the allegedly injured party. He states as follows:

> In the present action, since deprivation, damage, and harm are necessary elements of the legal theories invoked, claims of (1) violations of constitutional guarantees under the Fifth and Fourteenth Amendments of the U.S. Constitution and (2) violations of RICO arise where the locus criminis or the locus in quo of such deprivation,

damage, and/or harm occurs. In the present action, that place is Kankakee County, State of Illinois.

(Plaintiff's Response in Opposition to Defendants' Motion To Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue, #9, p. 12.) He cites no authority to support his argument.

This Court has reviewed Plaintiff's long and detailed complaint and finds no allegations of any events taking place in the Central District of Illinois. The party requesting a transfer of venue bears the burden of showing that a different venue is "clearly more convenient." *Heller Fin*, 883 F.2d at 1293. Here, Defendant has met its burden. Courts may consider the convenience of parties and witnesses when addressing a request for transfer of venue. 28 U.S.C. § 1404(a). All Defendants reside in California. Moreover, based on the lengthy complaint, it appears that most of the alleged events occurred in California, although some of the banking activities occurred in Oregon. In fact, Plaintiff has not alleged any connection with the Central

District of Illinois except that he now resides there. While the Court acknowledges that a plaintiff's selected venue is given some deference; in a case such as this, where the material events giving rise to the claim have no connection with the plaintiff's preferred venue, the Court need not defer to the plaintiff. See *Pasulka*, 131 F. Supp. at 994. Nothing in the complaint indicates a connection with the Central District of Illinois and this lawsuit's connection to California is unmistakable. Accordingly, the Court recommends granting Defendant's motion to transfer venue to the United States District Court for the Central District of California. Because the Court recommends transferring this case, it will not consider Defendant's motion to dismiss on the basis of improper venue.

B. Plaintiff's Motion To Amend

After Defendant filed its motion to transfer venue, Plaintiff filed a motion to amend his complaint, requesting leave to amend the complaint "to take into account the statements made by Defendants' Motion to Dismiss

Complaint for Improper Venue . . . for the purpose of making such amended complaint clearer and more concise." (Plaintiff's Motion to File Amended Complaint, #7, p. 6.) In his Memorandum of Law in Support of Plaintiff's Motion To File Amended Complaint (#8), Plaintiff summarizes the allegations of his complaint and restates his desire to amend that complaint '"to take into account the statements made by Defendants' Motion to Dismiss." (#8, p. 6)

The Federal Rules of Civil Procedure require that "leave shall be freely given when justice so requires." Fed.R.Civ .P. 15. Nevertheless, a court need not allow amendment if it would be futile. *Payne v. Churchich*, 161 F.3d 1030, 1036 (7th Cir. 1998), *cert. denied*, 527 U.S. 1004 (1999). In this case, Plaintiff has filed an extremely detailed complaint, well beyond a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed.R.Civ.P. 8. Considering the detail Plaintiff has lavished on his complaint, the Court concludes that it is unlikely

that he left out any material events giving rise to the claim that would connect this claim to the Central District of Illinois. Accordingly, the Court recommends denying Plaintiff's motion to amend at this time.

IV. Summary

For the reasons set forth above, this Court recommends that Defendant's Motion To Dismiss (#4-1) be **DENIED** and Defendant's Motion for Change of Venue (#4-2) be **GRANTED**. The Court also recommends that Plaintiff's Motion To Amend (#7) be **DENIED** at this time. The parties are advised that any objection to this recommendation must be filed in writing with the clerk within ten (10) working days after being served with a copy of this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views, Inc. v. Studio 21, Ltd*, 797 F.2d 538 (7th Cir. 1986).

Entered this 28th day of August, 2001.

/s/

DAVID G. BERNTHAL
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

BRAD R. JOHNSON, Plaintiffs, v. FRANCHISE TAX BOARD, STATE OF CALIFORNIA; OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; BILL LOCKYER, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; DENNIS L. STOUT, OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; and COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, Defendants	**FILED** SEP 19 2001 John M. Waters, Clerk U.S. DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS **Case No. 01-CV-2145**

ORDER

A Report and Recommendation (#13) was filed by the Magistrate Judge in the above cause on August 28,

2001. On September 17, 2001, Plaintiff, Brad R. Johnson, filed his Objection to the Report and Recommendation (# 14) and a Memorandum in Support (# 15). This court has carefully reviewed the Magistrate Judge's reasoning and Plaintiff's Objection and Memorandum of Law. After a thorough and careful de novo review, this court agrees with the Magistrate Judge that this case should be transferred to the Central District of California, but concludes that the transfer must be pursuant to 28 U.S.C. § 1406(a) rather than pursuant to 28 U.S.C. § 1404(a).

Defendants County of San Bernardino, the Office of the District Attorney and Dennis Stout, filed a Motion to Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue (#4). Plaintiff is correct that Defendants did not ask this court to transfer venue pursuant to 28 U.S.C. § 1404(a). Defendants moved for dismissal of Plaintiff's Complaint pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and, in the alternative, sought an order transferring the case pursuant

to 28 U.S.C. § 1406(a). While a court may consider a transfer pursuant to 28 U.S.C. § 1404(a) sua sponte (see AMCO Ins. Co. v. Tutera Group Inc., 1994 WL 714560, at *2 (N.D. Ill. 1994); Smith v. Thomas, 1990 WL 37630, at *2 (N.D. Ill. 1990)), such a transfer is only proper where venue is proper in the transferor court (AMCO Ins. Co., 1994 WL 714560, at *1).

In this case, this court concludes that venue is not proper in this court. Defendants incorrectly argued that Plaintiff based "the venue of the present action in large part upon the court's diversity jurisdiction." It is clear, however, that Plaintiff has alleged federal causes of action based upon 42 U.S.C. § 1983 and the Racketeering Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.). Pursuant to 28 U.S.C. § 1391(b), where jurisdiction is not founded solely on diversity of citizenship, a civil action may be broughtonly in:

(1) a judicial district where any defendant resides, if all defendants reside in the same State,

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought. 28 U.S.C. § 1391(b).

"One of the central purposes of statutory venue is to ensure that a defendant is not 'haled into a remote district having no real relationship to the dispute.'" Selzer v. County of Allegan, 1998 WL 749436, at *5 (N.D. Ill. 1998), quoting Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995).

In this case, all of the Defendants are residents of California and, therefore, none of the Defendants are residents of this district. Accordingly, Plaintiff cannot rely on 28 U.S.C. § 1391(b)(1) to establish venue here. Plaintiff argues that venue is proper under 28 U.S.C. § 1391(b)(2) because he is a resident of this district and, therefore, this

is where the injury occurred. This court does not agree. Based upon the detailed allegations of Plaintiffs Complaint (#1) as well as the Affidavit of Plaintiff (#11) and the Affidavit of Viki S. Hollander (#12), it is clear that all of the actions by Defendants that Plaintiff is complaining of occurred in California. There are no facts alleged showing that any of "the events or omissions giving rise to the claim occurred" in this district. See 28 U.S.C. § 1391(b)(2).

This court has carefully reviewed all of the case law cited by Plaintiff and finds all of it inapplicable to this case. The case law simply does not support Plaintiff's notion that the fact that he resides here, and thereby allegedly suffered financial damage and damage to his reputation here, as a result of Defendants' wrongful actions in California, means that venue is proper in this district. In all of the cases cited by Plaintiff, some action, such as kidnapping or discharge from employment, occurred in the district where venue was found to be proper. This court further notes that Plaintiff's citation of cases

involving infringement of a patent, trademark or copyright are clearly inapplicable. This court concludes that this case is most similar to Selzer. In that case, the pro se plaintiff alleged that the defendants, all of whom were residents of Michigan, engaged in a conspiracy against her to deprive her of her property rights. The plaintiff based her cause of action on 42 U.S.C. § 1983, 1985 and 1986, and on RICO. The court in Selzer concluded that venue was not proper in the Northern District of Illinois, the district where the plaintiff resided. Selzer, 1998 WL 749436, at *5.

This court also rejects Plaintiffs suggestion that venue is proper in this district because Plaintiffs bank account is located here. Based upon the allegations of this case, Plaintiffs bank account was garnished by Defendants on two occasions. Plaintiffs Affidavit shows that the garnishment notices were sent to U.S. Bank in Portland, Oregon. Further, Plaintiff stated in his Affidavit that the U.S. Bank branch nearest to him was located in the North

Chicago suburb of Lincoln Park. Plaintiff nevertheless contends that his bank account is located in this district "[b]ecause the situs of my U.S. Bank account is my place of domicile." Even accepting this rather bold, essentially unsupported statement, Plaintiff has not shown that venue is proper here. Plaintiff is seeking damages from Defendants, not any relief related to his bank account. Accordingly, Plaintiff's bank account is not the "subject" of this action and venue is not proper even if Plaintiff is correct that his bank account is located here. See 28 U.S.C. § 1391 (b)(2) (venue proper in judicial district where "a substantial part of property that is the subject of the action is situated").

In addition, to the extent that Plaintiff raises RICO claims against Defendants, 18 U.S.C. § 1965 is the applicable venue statute. Under 18 U.S.C. § 1965, a civil action against any person may be instituted in the district court of the United States for any district in which such

person is found, has an agent, or transacts his affairs" (18 U.S.C. § 1965(a)) or "in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court" (18 U.S.C. § 1965(b)). In this case, it is clear that venue is not proper based upon § 1965(a) because no Defendant resides here or has any connection to this district. As far as § 1965(b), the Seventh Circuit has suggested that the "ends of justice" do not require proper venue in a district where another district will have jurisdiction over the defendants. See Lisak v. Mercantile Bancorp. Inc., 834 F.2d 668, 672 (7th Cir. 1987); cert. denied, 485 U.S. 1007 (1988); Selzer, 1998 WL749436, at *5. This court concludes, based upon Lisak and Selzer that the "ends of justice" do not require it to summon the California Defendants to this district. See Selzer, 1998WL 749436, at *5. This court sees no reason to hale these Defendants into this district for actions they committed in California. Accordingly, this court concludes that venue is not proper

in this district for Plaintiff's RICO claims. See Selzer, 1998 WL 749436, at *5.

This court has concluded that venue is not proper in this district. However, this court declines to dismiss the action. When a case is filed in the wrong district, 28 U.S.C. § 1406(a) authorizes the district court to dismiss or "if it be in the interest of justice," to transfer the case to "any district or division in which it could have been brought." Following careful consideration, this court concludes that the "interest of justice" supports granting Defendants' alternative request that this case be transferred to the Central District of California pursuant to 28 U.S.C. § 1406(a). See Selzer, 1998 WL 749436, at *6.

Finally, this court agrees with the Magistrate Judge that Plaintiffs Motion to File Amended Complaint (#7) should be denied. This court agrees that it is unlikely that Plaintiff left out of his Complaint any material events giving rise to the claim that would connect this claim to the

Central District of Illinois. This court has reached this conclusion after careful review of Plaintiff's detailed Affidavit (#11).

IT IS THEREFORE ORDERED THAT:

(1) Plaintiffs Motion to File Amended Complaint (#7) is DENIED.

(2) Defendants' Motion to Dismiss Complaint for Improper Venue, or in the alternative, Motion for Change of Venue (#4) is GRANTED. This case is transferred to the Central District of California pursuant to 28 U.S.C. § 1406(a).

Entered this 19th day of September, 2001.

/s/

MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

BRAD R. JOHNSON, Plaintiffs, v. FRANCHISE TAX BOARD, STATE OF CALIFORNIA; OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; BILL LOCKYER, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; DENNIS L. STOUT, OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; and COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, Defendants	**FILED** OCT 30 2001 John M. Waters, Clerk U.S. DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS **Case No. 01-CV-2145**

ORDER

On September 19, 2001, this court entered an Order (#16) which DENIED Plaintiff's Motion to File Amended Complaint (#7) and GRANTED the Motion for Change of

Venue (#4) filed by Defendants County of San Bemardino, the Office of the District Attorney and Dennis Stout. Also On September 19, 2001, Plaintiff filed his First Amended Complaint (#17). On October 2, 2001, Plaintiff filed a Motion for Reconsideration of this Court's Order (#18) and a Memorandum in Support (#19).

In his Motion, Plaintiff argues that this court improperly denied his Motion to File Amended Complaint. The court now concludes that Plaintiff is correct that he had the right to amend his "pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). A responsive pleading does not include a motion to dismiss. Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1056-57 (7th Cir. 1998). Therefore, because no responsive pleading had been filed, Plaintiff should have been allowed to file an amended complaint. However, Plaintiff did, in fact, file his First Amended Complaint (#17).

Plaintiff also argues that this court should not have granted Defendants' Motion for Change of Venue. This court has carefully considered all of the arguments raised by Plaintiff in his Motion and has also carefully considered all of the allegations included in Plaintiff's First Amended Complaint. This court notes that, while Plaintiff's First Amended Complaint adds claims for violations of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and for violations of the Fair Debt Collections Practices Act (15 U.S.C. § 1692-1692o), it does not add any allegations that any of "the events or omissions giving rise to the claim occurred" in this district. See 28 U.S.C. § 1391(b)(2). This court specifically notes that Plaintiff does not allege that any of Defendants' actions took place in Illinois. There are no allegations that Defendants sent anything to him in Illinois or made any telephone calls to him in Illinois. Accordingly, this court again concludes that venue is not proper in this district.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiff's Motion for Reconsideration (#18) is GRANTED as to Plaintiff's request that this court reconsider its Order which denied Plaintiff's Motion to File Amended Complaint (#7). Plaintiff's Motion to File Amended Complaint (#7) is now GRANTED. This court notes that Plaintiff has already filed his First Amended Complaint (#17).

(2) Plaintiff's Motion for Reconsideration (#18) is DENIED as to Plaintiff's request that this court reconsider its Order which granted Defendants' Motion for Change of Venue (#4). This case is transferred to the Central District of California pursuant to 28 U.S.C. § 1406(a).

Entered this 29th day of October, 2001.

/s/

MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE